Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1571

PASQUALE INTRIERI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PASQUALE INTRIERI,
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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner Pasquale Intrieri respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 21, 1976, affirming the judgment of the United States District Court for the Eastern District of New York. No opinion was rendered by the Court of Appeals for the Second Circuit. Said judgment is annexed hereto as attachment "A."

Jurisdiction.

This petition for certiorari was filed within 30 days of July 21, 1976 and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. In an income tax prosecution for the years 1968 through 1971, utilizing the cash expenditure method, did the respondent fail to satisfy the requirement of "the establishment, with reasonable certainty, of an opening net worth," as promulgated by *Taglianetti* v. *United States*, 398 F. 2d 558 (1st Cir. 1968), aff'd 394 U.S. 316 (1969), when:

> (a) The only evidence introduced in any way relating to said opening net worth of the Petitioner was his 1967 income tax return and testimony of his former wife that aside from the domicile they had both inhabited, as of their divorce in 1968, she "did not know what else he had";
>
> (b) There was not a scintilla of evidence that the Petitioner had not filed income tax returns for any years prior to 1967;
>
> (c) No income tax returns filed by the Petitioner subsequent to 1971 were introduced; and,
>
> (d) Evidence of Internal Revenue Service investigation pertained only to whether or not Petitioner had received non-taxable income for the years 1968 through 1971 and made no reference whatsoever to whether or not Petitioner had received any taxable income (albeit undeclared) prior to January 1, 1968, but expended by him during the years at issue.

2. Did the respondent prove beyond a reasonable doubt that any unreported taxable income expended by the petitioner during the years 1968 through 1971 was not received by him prior to January 1, 1968 when the investigation conducted by the Internal Revenue Service

concerned itself solely with whether or not there existed sources of non-taxable income to the petitioner only for the years 1968 through 1971?

3. Did the respondent prove beyond a reasonable doubt that expenditures were made by the petitioner in excess of his taxable income for the years 1968 through 1971 by calling, *as government witnesses,* the petitioner's mother, mother-in-law, and brother, who testified that they gave sums of money to the petitioner and by attacking their credibility without further connecting these expenditures to the petitioner.

4. Was the petitioner denied due process of law by the trial court's admitting evidence of an alleged subsequent consistent act which occurred in 1975, four years after the time period embraced by the indictment, to retroactively show the petitioner's intent, especially since the trial was held prior to the mandatory date for the filing of 1975 income tax returns?

5. Was the petitioner denied due process of law by the trial court's determination that the respondent's "reopening" its case-in-chief and offering "rebuttal evidence" were synonymous, thereby allowing the respondent to reopen its case-in-chief, subsequent to the close of the petitioner's case in order to present evidence allegedly establishing a "starting point" by negating assets available to the petitioner prior to January 1, 1968, which may have been utilized to make the expenditures reflected during the years embraced by the indictment where such evidence did in no way rebut the petitioner's case?

6. Was the petitioner denied due process of law by the trial court's allowing the respondent, in rebuttal, to make reference to the fact that the petitioner had elected not to testify in his own behalf?

7. Did the trial court deny the petitioner a fair trial by stating to the jury in its charge that this was an "unusual" case when referring to the testimony of the petitioner's mother, mother-in-law, and brother, who were called and whose credibility was attacked by the respondent?

Federal Regulation Involved.

Internal Revenue Manual, Part 9, § 9327.1(4):

> "In net worth cases, the taxpayer's filing record and copies of available income tax returns should be furnished for at least five years preceding and all years subsequent to the starting point to furnish additional support to the starting point."

Statement of the Case.

The petitioner was convicted on March 5, 1976 in the United States District Court for the Eastern District of New York, after a jury trial, of four counts of willfully attempting to evade income tax in violation of 26 U.S.C. § 7201, and four counts of knowingly signing a false statement in violation of 26 U.S.C. § 7206 for the years 1968 through 1971. The petitioner was sentenced to imprisonment for a term of five years on those counts charging a violation of § 7201 and to imprisonment for three years on those counts charging a violation of § 7206, the sentences to be served concurrently. He was fined $30,000.

The method of prosecution utilized by the respondent, based upon the cash expenditure theory, was most peculiar. It consisted of the respondent calling, as government witnesses, the petitioner's mother-in-law, mother, and brother, each of whom had been previously summonsed to appear and did testify before the grand jury. Their testimony pertained to large expenditures made by them during the years at issue which the respondent seeked to attribute to the petitioner. Each of these witnesses testified to having accumulated various amounts of cash which was subsequently used to make the expenditures in question.

The respondent, after having called these individuals as prosecution witnesses, proceeded to attack their credibility in its effort to establish beyond a reasonable doubt that the expenditures in question had in fact been made by the petitioner. The respondent introduced evidence concerning its investigation into the financial history of the respective witnesses, including the financial history of their deceased spouses, in an attempt to establish the improbability of their having been able to accumulate the amounts of money to which they testified.

A special agent from the Intelligence Division of the Internal Revenue Service was called by the respondent and interrogated as to his investigation conducted in an attempt to negate the receipt by the petitioner of non-taxable income which may have been utilized to effectuate the expenditures in question. *All questions put to him pertaining to his investigation related only to the alleged non-receipt by the Petitioner of non-taxable income for the years embraced by the indictment, i.e., 1968 through 1971, and did in no way refer to the receipt of taxable income by the Petitioner, either during the years in question or prior to January 1, 1968.*

The trial court, over objection, allowed the respondent to introduce evidence that in 1975 the petitioner purchased an automobile for the price of $8,750 and requested that the seller prepare an invoice reflecting a purchase price of only $5,500. This act was utilized by

the respondent to show a four-year retroactive intent on the part of the petitioner, despite the fact that at the time said evidence was introduced (January, 1976), the due date for filing 1975 tax returns had not yet arrived.

At the close of the respondent's case, the petitioner moved for a directed verdict of acquittal on two related grounds:

(a) that the respondent had failed to establish with reasonable certainty the petitioner's opening net worth as of January 1, 1968; and

(b) that the respondent had not established, prima facie, that the expenditures in question allegedly made by the petitioner in the years 1968 through 1971 had in fact been received by him during those years as distinguished from prior to January 1, 1968. Said motion was denied, whereupon the petitioner called two witnesses to testify on behalf of the defense. Subsequent to the petitioner's resting his case, a second motion for judgment of acquittal on the same grounds was made and denied; whereupon the respondent moved to re-open in order to show that $4,000 which the petitioner had in bank accounts in 1968 remained with his former wife and was therefore not available to him for the purpose of making the alleged expenditures during the prosecution years. The respondent stated that its purpose was to establish a "starting point." The petitioner duly objected on the ground that said evidence was not proper rebuttal, but was merely an attempt by the respondent, after its consideration of the petitioner's two motions for directed verdicts of acquittal, to shore up its case against the petitioner with regard to the establishment of a "starting point." The petitioner's objection was overruled by the Court on the ground that there existed no distinction between rebuttal evidence and the re-opening of the respondent's case-in-chief.

In his argument, the petitioner stressed the lack of connection between the expenditures in question to himself, even assuming the respondent had successfully attacked the credibility of its own witnesses, the petitioner's mother, mother-in-law, and brother. The petitioner also argued that the respondent had failed to prove beyond a reasonable doubt that the taxable monies allegedly expended by the petitioner during the years 1968 through 1971 had not been received by the petitioner prior to January 1, 1968. In its rebuttal argument, the respondent made constant reference to the fact that there existed no evidence that these monies had been received by the petitioner as of December 31, 1967, thereby casting upon the petitioner the burden of proving an essential element of the crimes with which he was charged as well as commenting on the petitioner's constitutionally afforded election not to testify.

Reasons for Granting the Writ.

1. THE RESPONDENT FAILED TO SATISFY THE REQUIREMENT OF "THE ESTABLISHMENT, WITH REASONABLE CERTAINTY, OF AN OPENING NET WORTH."

In the instant income tax prosecution, based upon the cash expenditures theory, the respondent failed to satisfy the requirement of "the establishment, with reasonable certainty, of an opening net worth."

The "reasonable certainty" requirement is derived from the Supreme Court's opinion in *Holland* v. *United States*, 348 U.S. 121, 132 (1954).

> "In a typical net worth case, as *Holland*, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction.

> In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures." *Taglianetti* v. *United States, supra*, 398 F. 2d at 565.

Moreover, with regard to the requirement of satisfactorily establishing a starting point, the Internal Revenue Manual, part 9, § 9327.1(4) states:

> "The taxpayer's filing record and copies of available income tax returns should be furnished for at least five years preceding and all years subsequent to the starting point to furnish additional support to the starting point."

A recent example of the establishment of a sufficient starting point is reflected in *United States* v. *Fisher,* 518 F. 2d 836 (2d Cir. 1975). For in that case, dealing with the taxable years of 1967 through 1970, the government introduced evidence demonstrating that in 1967 the defendant had $30,000 in bank accounts in the name of his wife and his two children by another woman. His wife testified that as of January 1967, the beginning of the taxable period embraced by the indictment, *this constituted all the assets that she and the defendant possessed.* In referring to this unequivocal testimony, the *Fisher* court stated that such proof made clear the extent of any contribution which beginning resources or a diminution of resources over time could have been made to expenditures, satisfying the requirement of *Holland* of the establishment with reasonable certainty of an opening net worth. No such unequivocal testimony was adduced at the instant trial from the petitioner's former wife, who,

when questioned as to her knowledge of the petitioner's assets as of their divorce in April of 1968, answered: "I know he had the house. I don't know what else he had." It should also be noted that in *Fisher* the defendant *himself* claimed that he had a cash hoard of $193,000 which had existed prior to 1967. The prosecution, in *Fisher,* presented evidence to demonstrate that this money did not exist or that, if it did, it had not been depleted as of 1972. In the instant case, no such claim of a cash hoard was made *by the petitioner,* but rather, testimony of available funds came from his mother, mother-in-law or brother, who were called as prosecution witnesses by the respondent for the purpose of attacking their credibility. Thus, despite the instant jury's apparent rejection of this testimony by the petitioner's relatives, there nevertheless existed no connection linking any alleged non-reported taxable income directly to the petitioner.

A more recent Second Circuit case, *United States* v. *Bianco,* decided April 8, 1976, slip opinion no. 385—September Term 1975, involved an income tax prosecution based upon the cash expenditures theory for the years 1967 through 1971. A special agent of the Internal Revenue Service testified that:

1. He had examined real estate court records *from 1962 through 1972* (said examination commencing five years prior to the period embraced by the *Bianco* indictment).
2. He had checked, with negative results, approximately *one hundred* banks for accounts in the defendant's name.
3. He had checked, with negative results, with a brokerage house for any securities, holdings or dealings which the defendant might have had.
4. He had made inquiries of insurance brokers, doctors, schools, hospitals, the telephone company and the electric company.

5. He checked probate records for any inheritance which the defendant might have received, with negative results.

This Internal Revenue Service investigation was described by the *Bianco* court as having failed to reveal any assets held by Bianco at *any time* prior to or during the prosecution years.

In the instant case, the Internal Revenue Service investigation in no way concerned itself with any taxable income which the petitioner might have received *either* during the years embraced by the instant indictment (1968 through 1971) *or at any time prior thereto.* Said investigation had as its exclusive subject whether or not the petitioner had received non-taxable income *only for the years 1968 through 1971*, with no reference with regard to the potential receipt of non-taxable income by the petitioner for any of the years immediately preceding 1968.

Moreover, in *Bianco,* the court stressed that the government's case did not rely entirely upon this fruitless Internal Revenue Service search for assets; for in *Bianco* the government introduced Bianco's 1962 income tax return (five years prior to the commencement of the period embraced by the Bianco indictment) and also introduced evidence that Bianco had not filed tax returns for the years 1963, 1964 and 1965. In addition, the government called an attorney as a prosecution witness who testified that in the early part of 1966 he was unable to locate any assets from which to satisfy a $436.40 judgment entered earlier against Bianco.

In the instant case, the only filed return prior to 1968 introduced against the petitioner was for the taxable year of 1967, and no evidence whatsoever was presented to the effect that the petitioner had failed to file returns for any years prior to 1967. Further, no returns subsequent to 1971 were introduced by the respondent against the petitioner.

The petitioner respectfully contends that the evidence introduced by the respondent, as hereinabove described, failed to satisfy the "reasonable certainty" burden promulgated by *Holland* and *Taglianetti.*

2. The Respondent Introduced No Evidence Whatsoever Which would Tend to Negate the Possibility that Any Unreported Taxable Income Expended or Allegedly Expended by the Petitioner during the Years 1968 Through 1971 had Not been Received by Him Prior to January 1, 1968.

This burden of proof is related to reason no. 1 hereinabove set forth. This question of law was the subject of three motions for directed verdicts of acquittal made by the petitioner and, at the petitioner's request, was included in the trial court's charge to the jury. Indeed, in allowing the petitioner to remain on bail pending appeal to the Second Circuit Court of Appeals, the trial court noted that this issue was one of significance and substance.

3. Despite the Apparently Successful Attack on the Credibility of the Petitioner's Relatives, Called as Prosecution Witnesses, the Respondent Failed to Prove Any Connection Between the Monies Referred To by said Witnesses and the Petitioner.

As hereinabove noted, the petitioner's mother, mother-in-law and brother, called by the respondent, testified that they were the source of the main expenditures upon which the instant indictment was predicated. It must be assumed that their testimony created issues of fact which were apparently rejected by the jury as a result of their credi-

bility having been attacked by the respondent. Nevertheless, there was not evidence that said expenditures were made by the petitioner from monies possessed by him *and received by him* between January 1, 1968 and December 31, 1971.

4. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE RECEIPT OF THE TRIAL COURT OF EVIDENCE OF AN ALLEGED SUBSEQUENT CONSISTENT ACT WHICH OCCURRED FOUR YEARS AFTER THE TIME PERIOD EMBRACED BY THE INDICTMENT FOR THE PURPOSE OF RETROACTIVELY DEMONSTRATING THE PETITIONER'S INTENT.

The petitioner contends that there exists no case involving an income tax prosecution wherein a subsequent act was admitted for the purpose of retroactively showing intent on the part of a defendant with regard to the crimes charged against him.

In *United States* v. *Leonard,* 524 F. 2d 1076, 1092 (2d Cir. 1975), the court states that the probative value of an alleged *subsequent* similar act utilized to prove retroactive intent is dependent upon the existence of a close parallel between the crime charged and the act shown. In *Leonard,* when referring to the admission of evidence of a similar act which occurred approximately two years after the incidents alleged in the indictment (in the instant case, the subsequent act occurred four years thereafter), the court stated:

> "It would doubtless have been wiser for the judge to have excluded the evidence *or, at the least, to have excluded it until after the presentation of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it*" (emphasis supplied). See also, *United States* v. *Kaufman,* 453 F. 2d 306 (2d Cir. 1971).

The petitioner's trial occurred in January of 1976. Therefore, the petitioner contends that to label the 1975 incident as a "subsequent similar act" was premature, since despite the petitioner's requesting a bill of sale for the automobile in question reflecting a purchase price lower than that which was actually paid, it could not be ascertained as to how this transaction would have been reflected in the petitioner's income tax return for 1975 which had not yet been filed. Thus, there did not exist "a close parallel between the crime charged and the acts shown" (*Leonard,* at 1091) and the prejudicial effect thereof outweighed any probative value.

5. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSING TO DISTINGUISH BETWEEN THE RESPONDENT'S RE-OPENING ITS CASE-IN-CHIEF, ON THE ONE HAND, AND OFFERING REBUTTAL EVIDENCE ON THE OTHER.

Subsequent to the close of the petitioner's case, a second motion for directed verdict of acquittal was filed with the trial court based, among other things, on the respondent's alleged failure to establish a starting point with reasonable certainty. Obviously concerned with this potential insufficiency of proof, the respondent moved to re-open its case-in-chief in order to show the existence of $4,000 which the petitioner had in bank accounts in 1968, which funds had remained with his former wife and were therefore not available to him to spend in the years at issue. This evidence did in no way rebut the testimony of the two witnesses called by the petitioner in his case, and therefore the petitioner contends that since the evidence sought to be introduced by the respondent was not proper rebuttal and since the respondent did not aver any inadvertence or mistake

in its failure to include said evidence in its case-in-chief, allowing said respondent to "re-open" its case deprived the petitioner of due process of law.

6. THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND HIS RIGHTS UNDER THE FIFTH AMENDMENT TO ELECT NOT TO TESTIFY IN HIS OWN BEHALF BY REFERENCES MADE BY THE RESPONDENT IN REBUTTAL ARGUMENT TO THE EFFECT THAT THE PETITIONER HAD NOT TESTIFIED IN HIS OWN BEHALF.

The petitioner's counsel, in his summation, argued that:

> "Even if you are convinced beyond a reasonable doubt that the defendant received income upon which he did not pay taxes, if you have a reasonable doubt as to whether such unreported income was received by him prior to January 1, 1968, you must find him not guilty."

In rebuttal summation, the respondent states:

> "Have you heard any evidence that the defendant evaded his income tax in prior years and the money he spent during the years in question, there is nothing like that in the record."

The petitioner submits that the inevitable inference of these remarks by the respondent was that the only individual who could reasonably be expected to offer evidence that unreported income expended from 1968 through 1971 had been received prior to January 1, 1968 was the petitioner himself. Therefore, the petitioner contends that the statements of the respondent constituted a prejudicial reference with regard to petitioner's constitutionally guaranteed election not to testify. Accordingly, the petitioner contends that these remarks of the respondent were prejudicially improper and constituted constitutionally reversible

error. *Griffin* v. *California,* 380 U.S. 609; 85 S. Ct. 1229 (1965); *United States* v. *Dioguardi,* 492 F. 2d 70 (2d Cir. 1974).

7. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S STATING TO THE JURY, WHEN REFERRING TO THE TESTIMONY OF THE PETITIONER'S MOTHER, MOTHER-IN-LAW AND BROTHER, WHO WERE CALLED AND WHOSE CREDIBILITY WAS ATTACKED BY THE RESPONDENT, THAT "THIS WAS AN UNUSUAL CASE."

A trial court's participation during the trial must never reach the point at which it appears to the jury that the court believes the accused is guilty. *United States* v. *Nazzaro,* 472 F. 2d 302 (2d Cir. 1973). A trial judge "may not impose on a jury his own notion of which inferences are reasonable" from the evidence presented. *United States* v. *DeLoach,* 504 F. 2d 185, 190 (D.C. Cir. 1974).

Under our system of jury trials, the influence of the trial judge on the jury is necessarily and properly of great weight, and his slightest word or intimation is received with deference and may prove controlling. *Starr* v. *United States,* 153 U.S. 614, 626; 14 S. Ct. 919, 923 (1894).

The petitioner submits that this remark by the trial court far exceeded the bounds of "marshalling the evidence," was legally unnecessary and improper, and adversely prejudiced the jury against the petitioner, thereby denying him of his right to due process of law, i.e., a fair trial.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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Attachment A.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of July one thousand nine hundred and seventy-six.

Present: HON. STERRY R WATERMAN

HON. THOMAS J. MESKILL, C.JJ.

HON. JOHN R. BARTELS, D,J,

Circuit Judges,

United States of America, Plaintiff-Appellee v. Pasquale Intrieri, Defendant-Appellant.	76-1109

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

by: Vincent A Carbone
Chief Deputy Clerk

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